Petition

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SUPREME COURT U.S.

No. 81 5478

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNETH HARDY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

==========

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia's reimposition of petitioner's death sentence on remand from this Court, without any jury participation or other procedural safeguards, violated petitioner's Sixth, Eighth and Fourteenth Amendment rights?

2. Whether the Supreme Court of Georgia's failure to allow petitioner any opportunity to be heard during his resentencing proceedings violated his Sixth, Eighth and Fourteenth Amendment rights?

3. Whether the Supreme Court of Georgia's failure to consider whether erroneous and defective instructions to the sentencing jury tainted the death sentence returned by the jury in violation of petitioner's Eighth and Fourteenth Amendment rights?

4. Whether the Supreme Court of Georgia construed or applied Ga. Code Ann. §27-2534.1(b)(7) in an unconstitutionally vague or overbroad fashion in petitioner's case?

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STATE OF GEORGIA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Kenneth Hardy ("petitioner") prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered March 3, 1981.

CITATION TO OPINIONS BELOW

The "addendum" opinion of the Supreme Court of Georgia on remand from this Court is reported at 247 Ga. 235, 275 S.E. 2d 319 (1981) and is reproduced and annexed hereto as Appendix A. The opinion of the Supreme Court of Georgia on petitioner's initial appeal, which is reported at 245 Ga. 272, 264 S.E.2d 209 (1980), is annexed as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia on remand was entered on March 3, 1981.[1/] No motion for rehearing was filed.

1/ This petition was due on May 2, 1981. This Court has held that an untimely certiorari petition is not jurisdictionally defective. Taglianetti v. U.S., 394 U.S. 316 n.1 (1969); Heflin v. U.S., 358 U.S. 316 n.1 (1969). Because this is a capital case it is crucial that the Court give consideration to the underlying petition.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " . . . nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

This case also involves Ga. Code Ann. §27-2534.1(b)(7), which provides in relevant part:

> "In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (7) The offense of murder ... was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

STATEMENT OF FACTS

Petitioner's previous petition for a writ of certiorari was granted by this Court on November 18, 1980. Hardy v. Georgia, __ U.S. ___, 66 L.Ed.2d 285 (1980). Therein, the judgment of the Georgia Supreme Court affirming the death sentence was vacated and petitioner's case was remanded for "further consideration in light of Godfrey v. Georgia," 446 U.S. 420, 64 L.Ed.2d 398 (1980). On remand, after having failed to rule on petitioner's timely written motion for full briefing and oral argument, the Supreme Court of Georgia reaffirmed petitioner's death sentence on March 3, 1981.

Trial and Conviction

Kenneth Hardy was convicted by a jury on January 13, 1978 in the Superior Court of Banks County, Georgia, of having murdered Lewis J. Ingram in the town of Commerce on July 30, 1977. Petitioner thereupon received the death sentence upon the jury's recommendation that such sentence be imposed.

Background Facts

The cast of characters in the events preceding the crime is large and, until the specific instances of physical abuse which culminated in the shot-gun killing of Ingram, the events of that Saturday night in Commerce do not appear to be particularly out of the ordinary given the social circumstances and milieu.

Lewis J. Ingram was a resident of North Carolina who had previously lived in the Commerce area and who still had relatives there. He spent Tuesday night, July 26, at his sister's home in Commerce and then, after telling her he was going to visit another sister who lived nearby (T.193)[2/] he left. Instead of

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2/ References to the trial court transcript are indicated by ("T. "). The supplemental transcript is indicated by ("Supp. T. ").

visiting his sister, Ingram checked into a motel (T.198) and began to frequent Charlie (Willie) Brown's Produce Stand on Highway #441 just outside of Commerce. (T.195) Brown saw that Ingram had several bills of large denomination on his person. (T.208) Charlie Brown's appears to have been a fairly popular place for local social gatherings and was the site of a weekly Saturday barbecue with many participants. (T.202)

Ingram visited Charlie Brown's on several occasions on Thursday and Friday and was observed to be drinking or to have been drinking rather steadily during that period. (T.197) This activity culminated in the barbecue at Charlie Brown's at which people began congregating during the afternoon of Saturday, July 30. Mr. Ingram continued his consumption of hard liquor and, as the evening wore on, was seen to be drinking quite heavily. (T.227)

Socializing and drinking with Ingram during the barbecue were, among others, Buster Minish, Billy Hardy (petitioner's brother) and "Dub" Hardy (petitioner's father). (T.202-203) Petitioner was not present at the Charlie Brown barbecue that afternoon or evening. (T.209)

Late in the afternoon, Ingram left the barbecue with Buster Minish in Ingram's pick-up truck. (T.206) They were going, apparently, to play poker with Billy Hardy at Billy Hardy's trailer which was adjacent to Dub Hardy's home not far from the produce stand. (T.363)

The crowd at the barbecue broke up later in the evening and Dub Hardy arrived home with his wife, Mary Hardy, at about 9 p.m. (T.282) When they arrived, they found Buster and Betty Minish and Billy and Carolyn Hardy with Ingram in Billy's trailer. (T.283-284)

At some point, not made clear from the testimony, Billy and Buster left the Hardy residence area and returned with Kenneth Hardy. (T.245) It is here, at the culmination of an evening of

barbecue, heavy drinking and poker playing that there is no precise picture of events. Testimony, often conflicting, was offered by Mary Hardy (petitioner's mother) and Betty Minish and by Dub Hardy, who was convicted of aggravated assault upon Ingram. Billy Hardy, who was indicted with petitioner and who was found guilty of the murder and sentenced to life imprisonment in a separate trial, did not testify as to his version of the events. Buster Minish, who was about to be indicted and who was evidently an active participant in the murder and the events leading up to it, apparently committed suicide several days thereafter. (T.537)

By all accounts, however, Lewis Ingram was sitting on a couch in Billy Hardy's trailer at about 9 p.m. in a state of somewhat advanced inebriation. (T.286) Dub Hardy testified to having heard Buster Minish, Billy Hardy, Kenneth Hardy and L. J. Ingram in loud vocal argument at that time. (T.287)

Mary Hardy testified that she saw her husband, Dub, enter the trailer and push L. J. Ingram out so that he fell into the yard. She stated that her husband hit Ingram several times. (T.331-332) Dub testified that he didn't touch Ingram and that it was the petitioner, his son, Kenneth, who did the beating. (T.291) Shortly afterwards, L. J. Ingram was placed in the back of his pick-up truck and Kenneth and Billy Hardy and Buster Minish drove off in two vehicles, the other car being Buster's pick-up truck. (T.377) Sometime later that evening, Buster Minish and the two Hardy brothers returned in Buster's truck to Dub Hardy's residence. (T.334)

At approximately 1:30 a.m. on July 31, 1977, the Banks County Sheriff's office received a telephone call informing it of a burning vehicle on the Jesse Shewbert Road in Banks County. Upon their arrival at the scene, deputies discovered the victim's body in the burning truck. (T. 427) The cause of death was

determined to have been by shot gun blast and the autopsy established that Ingram was dead prior to the fire. (T.496)[3/]

Subsequently, Billy, Kenneth and Dub Hardy were arrested and brought to the Banks County jail. (T.532) A warrant was issued for the arrest of Buster Minish who, before being apprehended, apparently shot himself and was pronounced dead on arrival on August 4, 1977 at a nearby hospital. (T.537)

Petitioner's trial began with jury selection on Thursday, January 12, 1978 and concluded, after the jury found petitioner guilty, with a sentence of death on the evening of Friday, January 13, 1978.

Sentencing

Prior to sentencing, petitioner offered evidence in mitigation which included the testimony of his employer that Kenneth Hardy, who worked for him as a truck driver for three years had been one of the best workers he had ever had -- that petitioner could do the work of any two men and had missed only one day of work in three years. (T.601-602) A Baptist minister who knew petitioner and the Hardy family for over 20 years, testified as to Kenneth Hardy's sincere attempts to join the church and to overcome his rather unsavory bootlegging, liquor-hauling, family background. (T.606-609) Petitioner has no record of previous convictions. (Supp. T.22)

Kenneth Hardy's older sister also testified as to the attempts made by this particular brother to move himself away from the family both physically and behaviorally. (T.614-618)

No evidence as to aggravation was offered by the prosecution.

3/ There was no medical autopsy evidence offered regarding physical abuse to the victim prior to death. Blood stains, however, as well as an unidentified piece of cartilage were found in the general vicinity of the crime. (T.489)

In his closing argument, the prosecutor made no suggestion regarding the applicability to petitioner's case of the aggravating circumstances set out in Ga. Code Ann. §27-2534.1(b)(7)[4] other than to suggest that the presence of such circumstances provides the constitutional safeguard required by this Court in that "only the most horrible crimes are included...before the State [can] ask for the death penalty." (T.635) Instead, the prosecutor suggested reasons for imposing the death penalty which are not mentioned in the statute and which appear to have been offered merely to appeal to the emotions of the jurors and to overcome any moral scruples they might have against recommending the imposition of the death sentence.[5] (T.636-638) These reasons included the prosecutor's belief that capital punishment has a deterrent effect, that a murderer himself believes in capital punishment and that, in various ways, the murderer's "execution" of the victim can be contrasted most unfavorably with the State's putting "a murderer to death only to satisfy the demands of justice." (T.638)

The sentencing phase concluded with the trial court's instructions to the jury. These instructions contained flaws that cast serious doubt upon the constitutionality of the death penalty imposed on petitioner. First, the Court merely recited

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4/ Ga. Code Ann. §27-2534.1(b)(7) defines the aggravating circumstance as follows: "The offense of murder...was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

5/ The District Attorney used inappropriate inflammatory and passion provoking language from an ancient Georgia Supreme Court case:

> "Human life is sacrificed at this day, throughout this land, with more indifference than the life of a dog, especially if it is a good dog. Cain was the first murder, but who is the last, is known only to those who have read the morning papers. If this crime goes unpunished, let our skirts, as least, be free from the stain of blood-guiltness."

Hawkins v. State, 25 Ga. 207, 211 (1858)

the text of (b)(7) to the jury (T.648-649), without offering any definition of any of its terms; nor did the Court in any way attempt to elaborate upon or explain the meaning of the statutory language. No delimiting construction, no interpretation or clarification of any kind was tendered. Second, the trial court erroneously permitted the jury to impose the death penalty upon the finding of a non-statutory aggravating circumstance.[6/]

The jury was provided with a verdict form and, after deliberation, returned a verdict finding both aggravating circumstances (repeating verbatim all of the words of the two aggravating circumstances submitted to them without, for example, delineating which if any of the (b)(7) elements were found) and recommended the death penalty.

In its review on appeal from the verdict of the trial court, the Georgia Supreme Court affirmed the sentence, holding, inter alia that there was no error in result, even though the Court held that the trial court's instruction as to the non-statutory aggravating circumstance was erroneous. The Supreme Court of Georgia found the instruction error to be without significance since the jury found both aggravating circumstances and only one statutory aggravating circumstance is required to validate the death penalty. Hardy v. State, 264 S.E.2d 209, 215 (1980). In upholding the jury's finding of the (b)(7) aggravating circumstance, the Georgia Supreme Court failed to apply any limiting construction and, while it found that the victim was severely physically abused, it did not specifically find that petitioner himself inflicted the injuries on the victim or that he intended to do so. Indeed, the Georgia Supreme Court

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6/ The trial court submitted the following non-statutory aggravating circumstance to the jury instructing the jurors that the death penalty could be imposed if it found "[t]he offense was committed while the offender was engaged in the commission of robbery." (T.649)

refers to "the perpetrators"[7/] indicating that the jury could have found, as part of the conspiracy, that the aggravated battery and/or torture of the victim was inflicted by one or more of the other persons who were involved in this crime and not by petitioner.

The Supreme Court of Georgia's Actions on Remand

Following this Court's remand on November 18, 1980, petitioner served a timely written motion for fully briefing and oral argument on December 10, 1980. The issues upon which briefing and hearing was sought were the following:

(1) The nature and extent of the holding in Godfrey v. Georgia; (2) The application of the (b)(7) aggravating circumstance to the facts of appellant's case; (3) The effect of the possible misapplication of the (b)(7) circumstances on those cases in which two or more aggravating circumstances have been found by the trial jury; and (4) The effect of the trial court's erroneous instruction to the jury that it could impose the death penalty upon the finding of a non-statutory aggravating circumstance.

(A copy of petitioner's motion is annexed as Appendix C.) Petitioner received no notification of any ruling on this motion.

Without the benefit of brief or argument, the Georgia Supreme Court, in an opinion dated March 3, 1981, reaffirmed the judgment imposing petitioner's death sentence.

On remand, petitioner's motion to fully brief and argue the issues presented in this petition was not granted. In its opinion reaffirming the death sentence originally imposed the Georgia Supreme Court held that under the facts of the case the evidence supported the trial jury's finding of the (b)(7)

7/ Hardy v. State, supra 264 S.E.2d at 215 (Appendix B at 5b).

aggravating circumstance in that the murder "involved depravity of mind of the defendant and torture to the victim..." Hardy v. State, 247 Ga. 235, 275 S.E.2d 319, 321 (1981).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE PROCEDURES EMPLOYED BY THE SUPREME COURT OF GEORGIA IN REAFFIRMING THE DEATH SENTENCE ON REMAND VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

A. The Georgia Supreme Court Was Not The Appropriate Sentencing Authority To Reimpose The Death Sentence

In remanding petitioner's case "for further consideration in light of Godfrey v. Georgia," the Court did not designate the appropriate party to decide whether Ga. Code Ann. §27-2534.1 (b)(7), as clarified by Godfrey, actually fit the facts of petitioner's case. The Court, in other words, did not resolve the question of who should serve as petitioner's sentencing authority on remand.

Mr. Justice Marshall's concurrence in Godfrey strongly suggested that a trial jury must perform that task:

> "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards."

Godfrey v. Georgia, supra, 64 L.Ed.2d at 411 (emphasis in original). Mr. Justice Stewart's opinion for the Godfrey plurality, on the other hand, could be read to imply -- though it

did not hold[8/] -- that if "the Georgia Supreme Court can be said to have applied a constitutional construction" of subsection (b)(7), any deficiency at the trial jury level could be overcome. Godfrey v. Georgia, supra, 64 L.Ed.2d at 409.

More recently, Mr. Justice Marshall strongly reiterated his position, joined by Mr. Justice Brennan, in dissenting from the denial of certiorari in several of the Georgia death penalty (b)(7) cases remanded for consideration in light of Godfrey. In condemning the Georgia Supreme Court's reaffirmance of the death sentences in those cases on the ground that the jury could have found the aggravating circumstance had it been properly instructed, Justice Marshall stated:

> "I would have thought that Godfrey made clear that this sort of appellate speculation is impermissible. What I took to be the rule of Godfrey is that it is the discretion of the sentencer that must be properly narrowed.
>
> [citations omitted]
>
> In murder cases in the State of Georgia, only the trier of fact may impose a sentence of death. Consequently, it is the discretion of the trier of fact -- in these cases, the jury -- that must be narrowed. And no matter what facts the jury might find, it always retains under Georgia law the ultimate discretion to refuse to impose the penalty at all. An Appellate Court can do no more than guess at what a jury might have done. Thus only a new sentencing hearing before a properly instructed jury can accomplish the purpose of our remands for reconsideration in light of Godfrey. The decision of the Georgia Supreme Court in these cases to substitute its own judgment for that of the sentencer is, in my view, contrary to the mandates of this Court."
>
> Davis v. Georgia, Spraggins v. Georgia, Brooks v. Georgia, 49 U.S.L.W. 3785, June 8, 1981.

8/ Actually, the plurality insisted that "if a State wishes to authorize capital punishment...[i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, supra, 64 L.Ed.2d at 406.

The Georgia Supreme Court, on remand in petitioner's case, did not choose to remit to a trial jury for a redetermination of petitioner's sentence under a properly narrowed and defined construction of (b)(7). Instead, it designated itself as the trier of the sentencing issues and concluded that the evidence supported a finding of "serious physical abuse prior to death" which, in a previous opinion (Hance v. State, 245 Ga. 856 (1980)), the Georgia Court defined as "torture." Hardy v. State, supra, 275 S.E.2d at 321.

It is submitted that it is not constitutionally permissible for the Georgia Supreme Court to substitute its own discretion for that of the trial jury and to act, as it did, and independently reimpose a death sentence simply from its own review of the record.

"To conform to due process of law, petitione[r] [was] entitled to have the validity of [his] conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 201 (1948); accord, Chiarella v. United States, 445 U.S. 222, 63 L.Ed.2d 348, 363 (1980); Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). This "fundamental principl[e] of procedural fairness appl[ies] with no less force at the penalty phase of a trial in a capital case than...in the guilt-determining phase of any criminal trial. Cf. Gardner v. Florida, 430 U.S. 349 (1977)." Presnell v. Georgia, 439 U.S. 14, 16 (1978). The Georgia Supreme Court's attempt to reassess petitioner's sentencing issues, relying only upon a cold record, and in the absence of statutory authority,[9/] plainly denied petitioner the due process of law.

9/ The Supreme Court of Georgia is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives that court power to act as a sentencing authority de novo in a capital case.

B. The Failure Of The Georgia Supreme Court To Grant Petitioner A Hearing On Remand Violated His Sixth, Eighth and Fourteenth Amendment Rights

Even if the Supreme Court of Georgia, acting independently of a trial jury, could itself properly have reimposed a death sentence after a full hearing, its failure to grant petitioner any opportunity to present briefs or oral argument during the proceeding which determined his sentence, despite the timely motion made therefor, is manifestly unconstitutional. Had his case been remitted to the trial court, this Court is aware from its review of Georgia capital procedures in Gregg v. Georgia, 428 U.S. 153, 163-66, 196-97, 207-211 (1976) that petitioner would have been afforded an array of procedural rights, including the right to introduce sentencing evidence,[10/] the right to present closing arguments,[11/] and the right to have his sentence determined by a jury,[12/] which would have been charged by the trial court to consider not only any aggravating circumstances, but mitigating circumstances as well, and to weigh all factors in considering whether a death sentence should be imposed.[13/]

In addition, petitioner would have had the right to an automatic review of his sentence,[14/] encompassing the right to submit briefs[15/] and mandatory oral argument before the Georgia Supreme Court.[16/] In petitioner's case, however, the Georgia Supreme Court's unilateral review of the record constituted petitioner's only "resentencing hearing," and none of these basic procedural rights were afforded him.

10/ Ga. Code Ann. §27-2503(b).

11/ Ibid.

12/ Ibid.

13/ Ibid. Ga. Code Ann. §27-2534.1(b) & (c).

14/ Ga. Code Ann. §27-2537.

15/ Rules 39 & 41, Rules of the Supreme Court of Georgia (Effective August 1, 1979).

16/ Rule 54, Rules of the Supreme Court of Georgia (Effective August 1, 1979).

The Court needs no reminder that the capital "sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," Gardner v. Florida, 430 U.S. 349, 358 (1977); accord, Green v. Georgia, 442 U.S. 95, 97 (1979). The right to due process of law surely numbers "a chance to be heard [as]...among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal" Cole v. Arkansas, 333 U.S. 196, 201 (1948). Fundamental fairness in any sort of proceeding is denied unless, "'at a minimum [the]...deprivation of life liberty or property by adjudication [is]...preceded by notice and opportunity for hearing appropriate to the nature of the case'" Goss v. Lopez, 419 U.S. 565, 579 (1975), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). See Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); FTC v. National Lead Co., 352 U.S. 419, 427 (1957); Morgan v. United States, 304 U.S. 1, 18-19 (1938); Grannis v. Orlean, 234 U.S. 385, 394 (1914).

In addition to these basic due process rights, the "qualitative difference" under the Eighth Amendment between death and any other punishment requires "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see also, Lockett v. Ohio, 438 U.S. 586, 601 (1978); cf. Beck v. Alabama, 447 U.S. 625, 65 L.Ed.2d 392, 403 (1980). Yet petitioner was granted no opportunity to inform the sentencing authority "not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 260, 271 (1976).

Other important rights were compromised as well by the Georgia Supreme Court's unilateral action. The Sixth and Fourteenth Amendments entitle every defendant to the effective assistance of counsel, both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948)

as well as on appeal, Douglas v. California, 372 U.S. 353 (1963). Since effective assistance can be denied not only by outright exclusion of counsel from the criminal process but also by placing "restrictions upon the function of counsel in defending a criminal prosecution in accord with the tradition of the adversary factfinding process." Herring v. New York, 422 U.S. 853, 857 (1975); accord, Ferguson v. Georgia, 365 U.S. 570 (1961); Brooks v. Tennessee, 406 U.S. 605 (1972), a proceeding in which counsel for petitioner was given no "chance to marshal the facts in his favor," Wolff v. McDonnell, 418 U.S. 539, 564 (1974), or "to comment on facts which may influence the sentencing decision," Gardner v. Florida, 430 U.S. 349, 360 (1977), necessarily denied him any effective legal representation.

In Gardner, id. at 358, this Court observed that it "is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." The Georgia Supreme Court, no less than any other judicial component in the awesome process of determining life and death, is held to a higher standard under the Constitution than it met in petitioner's case below.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT A DEATH SENTENCE WAS AUTHORIZED UPON A FINDING OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE WAS AN ERROR OF CONSTITUTIONAL MAGNITUDE

Not only was petitioner prejudiced by the failure of the trial court to properly guide the jury as to the (b)(7) aggravating circumstance, but the sentencing procedure in petitioner's case was further and fatally flawed by the erroneous charge to the jury that it could consider "robbery" as an aggravating circumstance and impose the death penalty upon that finding alone. The Supreme Court of Georgia in its initial

review essentially ignored this error by stating that since the jury found both aggravating circumstances and since only one statutory aggravating circumstance was required to authorize the imposition of the death penalty, the death penalty was lawfully imposed.

Pursuant to the Georgia statutory procedure, the sentencing jury makes its life-or-death decision after a deliberative process in which its "attention is directed to the specific circumstances of the crime [and]...the characteristics of the person who committed the crime." Gregg v. Georgia, supra at 197. The function of the statutory definitions of aggravating circumstances is to direct the sentencing jury's attention to the most relevant factors. Id. at 197-198. Although the trial judge may enumerate other non-statutory aggravating circumstances warranted by the evidence under §27-2534.1(b) and the jury may consider them all, the death penalty may be imposed only upon the finding of a statutory aggravating circumstance.

By erroneously instructing the jury that if they found that the offense was committed while the offender was engaged in a robbery the death penalty could be imposed[17/] the trial court committed harmful error. This is especially so because the jury found the non-statutory aggravating circumstance as well as the statutory one and, having been instructed that the finding of either permitted the imposition of the death penalty, recommended the death penalty for petitioner upon the finding of both. Thus, in petitioner's case there were two defective factors in the sentencing decision.

The case presented by petitioner is far stronger than those presented by instances where only one of multiple aggravating circumstances was defective. In a number of Godfrey remand cases the Georgia Supreme Court used, as a basis for reaffirming the

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17/ Appendix B at 8b.

death sentence, the existence of and finding by the trial jury of other statutory aggravating circumstances. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980); Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980); Dampier v. State, 245 Ga. 882, 268 S.E. 2d 349 (1980); Gates v. State, 244 Ga. 587 (1979).

In Gates, the Georgia Supreme Court held that where two or more statutory aggravating circumstances are found by the jury, the failure of one does not so taint the proceedings as to invalidate the other aggravating circumstances. Id. at 598.

However, dissenting from the denial of certiorari in Martin v. Louisiana, ___U.S.___, 49 U.S.L.W. 3370 (1980), Mr. Justice Stewart stated the issue posed by the ambiguity of the jury findings and verdict of death in the Louisiana case before the Court:

> "Under the state death penalty statute...while the jury was permitted to impose capital punishment where it found only a single aggravating circumstance, it was not required to do so...The Louisiana court's reasoning, therefore, ignores the possibility that some of the jurors may have voted for the death sentence because of the existence of the second aggravating circumstance alone, or that others may have voted for the death penalty only because of the existence of the two aggravating circumstances.
>
> The jury's verdict thus makes it impossible to determine whether some or all of the jurors may have relied on the existence of the second aggravating circumstance in reaching their decision to impose the sentence of death..."

Mr. Justice Stewart found the same rationale applicable under the Georgia capital punishment scheme:

> "[U]nder Georgia's capital punishment scheme, only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death."

Westbrook v. Balkcom, ___ U.S. ___, 49 U.S.L.W. 3371 (1980) (Stewart, J., dissenting).

Recently, in Hill v. Georgia, 49 U.S.L.W. 3785 (U.S. June 8, 1981), Mr. Justice Marshall, joined by Mr. Justice Brennan in dissent from the denial of certiorari, found grounds for serious criticism of the Georgia Supreme Court remand procedure and put into question that court's ability to "forecast the decision of the properly instructed sentencing authority." Justice Marshall found that the State's failure to remit the death sentence for a determination was "particularly troubling...where the remaining ground for imposing the death sentence is itself vulnerable to constitutional attack." 49 U.S.L.W. at 3785. In Hill the questionable procedure below was the inclusion of the capital felony statutory aggravating circumstance in light of the failure of the trial court to grant petitioner's request for an instruction on statutory rape which would not have constituted a statutory aggravating circumstance permitting imposition of the death penalty.

The Florida Supreme Court has held in Elledge v. State, 346 So.2d 998 (1977), that a new sentencing hearing may be constitutionally required where a defective aggravating circumstance was taken into consideration in sentencing along with other properly considered circumstances. It expressed its reasoning as follows:

> "[R]egardless of the existence of other authorized aggravating factors we must be on guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death...
>
> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [defective aggravating circumstance] shall not be considered...This result is dictated because, in order to satisfy Furman v. Georgia...the sentencing authority's discretion must be 'guided and channeled by requiring examination of specific factors that argue in favor of or

> against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition...'"

346 So.2d at 10003 [emphasis in the original; citations omitted].

Recently, the U.S. Court of Appeals for the Fifth Circuit reversed and remanded a Georgia death sentence because one of the three aggravating circumstances found by the jury was subsequently held to be unconstitutional even though the two remaining aggravating circumstances were each legally sufficient. In Stephens v. Zant, 631 F.2d 397, 406 (5th Cir., 1980), the Court stated that:

> "[i]t is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground."

The Court concluded that given such facts, the death penalty imposed was not "rationally reviewable" in accordance with the teaching of Woodson, nor was the discretion of the jury sufficiently channeled as required by Godfrey.

Following Stephens, the U.S. District Court for the Southern District of Georgia reversed and remanded the death sentence in Burger v. Zant (Blake v. Zant, 513 F. Supp. 772 (1981)). In Burger, the trial court had instructed the sentencing jury that it could return the death penalty if it found any one of the three charged aggravating circumstances. The jury had been instructed on the b(7) aggravating circumstance (without a limiting instruction) and had also been charged that the death penalty could be imposed if the murder had been committed in the course of other capital crimes, i.e. kidnapping and armed robbery.

The Georgia Supreme Court, in reviewing the sentence on appeal, held that the trial court had erred in its instructions on the "other capital crimes" aggravating circumstance by failing to define "kidnapping" and "armed robbery." However, as in petitioner's case, the Georgia Supreme Court upheld the death sentence despite this flaw because it maintained that the b(7) aggravating circumstance had been properly charged and found. Burger v. State, 245 Ga. 458, 265 S.E.2d 796 (1980). The Federal District Court found it significant that under the Georgia statute the jury is free to decline to request the death penalty even if it should find an aggravating circumstance to be present. Thus, the Court stated at 513 F. Supp. 772, 801:

> "the removal of a specific factor would not vitiate a finding of other factors, but it might well alter a jury's ultimate determination of death, which is after all the subject of appellate review. While the jury may be seen as returning a special verdict as to the presence or absence of particular circumstances, its ultimate determination of death is nonetheless general because it is not dictated by these factors, but only permitted under them. This Court concludes then that, even in the absence of Stephens, the important question is not whether the jury could have imposed death without the improper charge, but whether it in fact did impose sentence based in some part on this consideration. More particularly, the Court must consider whether 'substantial risk' of unguided discretion was created and whether 'rational' appellate review was thereby precluded." [Emphasis in original]

Petitioner's case is even stronger than Burger since the trial court's instruction that the death penalty could be imposed on the finding of simple "robbery" - a non-statutory circumstance - was totally erroneous. How the jury was affected by the flawed charge is purely a matter of conjecture.

As this Court has made abundantly clear, when a defendant's life hangs in the balance, "doubts [as to how defective jury instructions may have affected jurors' sentencing deliberations]...should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). Thus the

finding of the non-statutory aggravating circumstance, erroneously permitted by the trial court's instructions and made in accordance therewith by the sentencing jury, may very well have spelled the difference between petitioner's life and his death. This can only be the "subject of sheer speculation" and such uncertainty is constitutionally impermissible. Godfrey, supra at 454.

III

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER ON THE REMAND OF PETITIONER'S CASE THE SUPREME COURT OF GEORGIA CONSTRUED OR APPLIED GA. CODE ANN. §27-2534.1(b)(7) IN AN UNCONSTITUTIONALLY VAGUE OR OVERBROAD MANNER

The death sentence in Godfrey was vacated because this Court determined that the Georgia Supreme Court had applied the statutory aggravating circumstance set forth in Ga. Code Ann. §27-2534(b)(7) in a vague and overbroad manner.

Subsequently, this Court vacated the death sentences of a number of Georgia convicts including petitioner's sentence and directed reconsideration in each case in light of Godfrey.

The Georgia Supreme Court has chosen on remand to interpret Godfrey in an extremely narrow way, confining Godfrey's apparent reach to the peculiar facts of that case. Thus, petitioner's death sentence was reinstated after the following assessment by the Georgia Supreme Court:

"The evidence in this case shows that unlike Godfrey, the victim was not killed instantaneously; he was not a member of the appellant's family, nor was he threatening the appellant in any manner." Hardy v. State, supra, 275 S.E.2d at 320-321.

Similarly in other "Godfrey remand" cases the Georgia Supreme Court has distinguished the remanded case from the particular facts of the Godfrey case. Thus, in Hamilton v. State, supra, 271 S.E.2d at 173-174 (1980):

"Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to the defendant, and the victim was in no way threatening nor hostile to the defendant."

See, Baker v. State, 272 S.E.2d 61 (1980): ("The evidence in this case shows that, unlike Godfrey, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner"); Brooks v. State, 271 S.E.2d 172 (1980): ("In the present case, the victim died, not instantaneously, but a full 2 hours after being shot in the neck and abandoned by the appellant"); Collins v. State, 271 S.E.2d 352 (1980): ("This court finds material differences...which distinguish this murder from the murder in Godfrey and from other 'ordinary' murders for which the death penalty is not appropriate...the victim was not related to the appellant...was not threatening the appellant nor was she causing any emotional trauma to him...appellant left the scene and attempted in every manner to avoid prosecution..."); Davis v. State, Spraggins v. State, 271 S.E.2d 828, 830 (1980): ("Unlike the murder in Godfrey, death was not instantaneous, the victim was not related to either defendant, and the victim was in no way threatening nor hostile to the defendants.")

In emphasizing the factual peculiarities of Godfrey, the Georgia Supreme Court has ignored Godfrey's central teaching -- that any State which determines to impose capital punishment has a constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty," Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. In fact, the rash of affirmances by the Georgia court since Godfrey on (b)(7) grounds,[18/] a number of them highly questionable,

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18/ Beyond the five "Godfrey remand" cases cited hereinabove, the Georgia Supreme Court has examined and affirmed on (b)(7) grounds at least four other cases on subsection (b)(7) grounds since Godfrey. Mulligan v. State, ___ Ga. ___, 268 S.E.2d 351 (1980); Fair v. State, ___ Ga. ___, 268 S.E.2d 316 (1980); Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980); Dampier v. State, 245 Ga. 882, 268 S.E.2d 349 (1980).

makes it difficult to deny Mr. Justice Marshall's suggestion that the Georgia Supreme Court's decision in Godfrey involved not "an aberrational lapse...from an ordinarily narrow construction of §(b)(7)," Godfrey v. Georgia, supra, 64 L.Ed.2d at 411, but instead an aggravating circumstance which has been "defined...so broadly that practically every murder fits within its reach," id. at 414, thereby violating the Eighth Amendment and the due process clause of the Fourteenth Amendment.

An examination of the facts of petitioner's case indicates that the Georgia Supreme Court continues its overbroad application of §(b)(7).

For example, the Georgia Supreme Court appears to have pieced together a number of hearsay[19/] statements, made by witnesses, of what was told to each of them by one or another of the actual participants in the murder, and then to have concluded that the jury must have found, without having been so instructed, that petitioner specifically committed each of the acts virtually alone. Yet, it is undisputed that three other men were actively involved in each of the acts which culminated in the murder of Lewis Ingram: Dub Hardy, petitioner's father, who prior to giving testimony in petitioner's case pleaded guilty to a reduced charge of conspiracy to murder; Billy Hardy, petitioner's brother, who was convicted of the murder of Ingram and who received a life sentence; and, Buster Minish who was present at all times, but who died, an apparent suicide, prior to being served with an indictment.

The Georgia Supreme Court found that "[t]his was a cold blooded, planned execution type murder perpetrated for the purpose of robbing the victim, who was known to have a large amount of cash," Hardy v. State, supra, 275 S.E.2d at 321. Yet

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19/ Ruled admissible as having been uttered by co-conspirators during the pendency of a conspiracy. Hardy v. State, supra, 264 S.E.2d at 213.

there was no testimony offered that petitioner actually knew that the victim had any money nor was any money later found.

Although on remand the Georgia Supreme Court changed the word "perpetrators" to "perpetrator" in stating that petitioner "severely beat and partially disrobed the victim," the only specific testimony that petitioner struck the victim prior to the murder came from Dub Hardy (T.291). Mary Hardy, petitioner's mother, stated that she did not see petitioner hitting the victim but that she saw her husband, Dub Hardy, striking Ingram with an implement wrapped in a white rag. (T.253-256).

Dub Hardy testified that Billy Hardy, Buster Minish, and the petitioner, transported the victim to another area after having placed Ingram in his own pick-up truck. He stated that later the three men came back and that petitioner had with him and displayed two empty shotgun shells. (T.304).

The Georgia Supreme Court stated that the victim was "cut all to pieces" yet a reading of the medical evidence does not support that finding. The autopsy showed that the victim died as a result of gun shot wounds and that the body was burned subsequent to death. Although a piece of cartilage was discovered in the general vicinity (T.489) this was not further identified, nor was it offered as being part of the victim's body. (Medical testimony (T.486-502)) The only evidence offered as to any cutting was a statement that Mary Hardy made that Billy Hardy told her upon his return from the murder scene that the victim had been "cut all to pieces." (T.342)

No direct autopsy evidence was offered that gasoline was poured on the victim before he was shot. The testimony as to the gasoline was offered by Dub Hardy:

"Q. [District Attorney] When they came back...up there on the porch, did they say anything about L. J. Ingram saying anything about gas?

A. [Dub Hardy] Yes. Sir.

Q. Who said that?

A. I don't remember which one it was but he said, 'Please don't pour that gas on me' or something another like that.

Q. ...you don't say who said that?

A. No, sir. I can't recall which one said it. Kenneth I believe, but I won't say for certain now. But one or the other of 'em' said he said, 'Please don't pour that gas on me'" (T.310-311).

The Georgia Supreme Court concluded that "torture" (upon which it upheld the (b)(7) finding) "occurs when the victim is subjected to serious physical abuse before death." Hardy v. State, supra, 275 S.E.2d at 321. Even though there was admissible hearsay evidence of such abuse, there was certainly no clear evidence that petitioner was the torturer.

Although it is undeniable that the crime was vicious, this is so because the crime was undeniably a murder. But, it is submitted, there is "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, 64 L.Ed.2d at 409[20/].

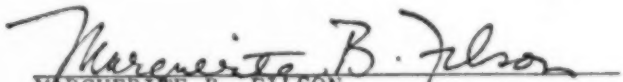
If the requirements of Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey v. Georgia, supra, are to be honored other than in the breach, this Court should grant certiorari to consider whether the Georgia Supreme Court's application of subsection (b)(7) to the facts of petitioner's case violated his Eighth and Fourteenth Amendment rights.

20/ None of the cases cited by the Georgia Supreme Court in its appendix to petitioner's case affirming the death sentence on appeal involve death sentences upheld in cases factually similar to petitioner's.

CONCLUSION

For the reasons stated above, petitioner prays that this Court grant a writ of certiorari to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,



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September 24, 1981.

APPENDIX A

247 Ga. 235
HARDY
v.
The STATE.
No. 35588.
Supreme Court of Georgia.
March 8, 1981.

[Headnotes omitted]

L. Eddie Benton, Jr., Commerce, Marguerite B. Filson (Western Electric), New York City, for Kenneth Hardy.

Nat Hancock, Dist. Atty., Jefferson, Arthur K. Bolton, Atty. Gen., Daryl A. Robinson, Asst. Atty. Gen., Atlanta, for the State.

CLARKE, Justice.

ADDENDUM

By order of the Supreme Court of the United States, this case, as to sentence only, has been vacated and remanded for further consideration by this court in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Hardy v. Georgia*, — U.S. —, 101 S.Ct. 523, 66 L.Ed.2d 285 (1980). Our opinion in this case is reported at 245 Ga. 272, 264 S.E.2d 209 (1980).

In *Godfrey v. Georgia*, supra, the Supreme Court of the United States held that Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied as to a specific factual circumstance. See *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

The appellant's sentence to death in this case rests upon a finding by a rational trier of fact beyond a reasonable doubt of Code Ann. § 27-2534.1(b)(7).[1]

As mandated, we have reviewed the sentence in this case, and this court finds material difference between Godfrey and the case under review which distinguish this murder from the murder in *Godfrey* and from other "ordinary murders" for which the death penalty is not appropriate.

[1] The evidence in this case shows that unlike *Godfrey*, the victim was not killed instantaneously; he was not a member of

[1] involved torture, depravity of mind or an aggravated battery to the victim."

the appellant's family, nor was he threatening the appellant in any manner. This was a coldblooded, planned execution type murder perpetrated for the purpose of robbing the victim, who was known to have a large amount of cash. With that purpose in view, the perpetrator severely beat and partially disrobed the victim seeking to find where he kept his money. As was pointed out in the original opinion, the victim was "cut all to pieces" and gasoline was poured over him before he was shot. When the appellant returned from the killing, he had blood on his clothing, and there was blood in the yard where the victim had been beaten prior to being put in the back of a pickup truck and taken to the actual execution site. Thereafter, the victim's truck with his body in it was burned in order to hide the crime.

[2, 3] The evidence supports a finding beyond a reasonable doubt of serious physical abuse prior to death. *Hance v. State*, supra. As we held in our original opinion, the jury's finding of Code Ann. § 27-2534.1(b)(7), torture occurs when the victim is subjected to serious physical abuse before death. *Hance v. State*, supra. A defendant who tortures a victim or subjects a victim to an aggravated battery before killing a victim can be found to have a depraved mind. See *Baker v. State*, 246 Ga. 259, 272 S.E.2d 61 (1980).

Under the facts of this case, we find that the murder was of the type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim as set forth above.

Judgment imposing the death penalty reaffirmed.

All the Justices concur.

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APPENDIX B

Cite as, Ga., 264 S.E.2d 209

HARDY

v.

The STATE.

No. 35588.

Supreme Court of Georgia.

Argued Jan. 14, 1980.

Decided Feb. 20, 1980.

[Headnotes omitted]

Summary of Facts

From the evidence presented at the trial, the jury was authorized to find the following facts.

Driving his pickup truck, the 60-year-old victim, Lewis J. Ingram, left his home in Thomasville, North Carolina, on July 26, 1977, en route to Commerce, Georgia, for the purpose of visiting relatives and friends. Upon arriving in Commerce, he visited his sister and spent one night in her home. The following day, he moved into a motel near Commerce and for the next four days spent a great part of his time at Willie Brown's Produce Stand on Highway 441 near Commerce. During the hours spent at the produce stand, the victim became acquainted with those persons who were operating the business and had the opportunity of talking with old acquaintances from Commerce, which was his boyhood home.

Upon leaving North Carolina, the victim had in his possession more than $1,000, mostly in one hundred dollar bills. His possession of a number of bills in large denomination became quickly known by several people. On the first night he was in Commerce, his sister saw the money he was carrying. An employee of the motel where he was staying also noticed a large amount of bills on the nightstand in his motel room. During his visits at Willie Brown's Produce Stand, the victim made several purchases from Dub Hardy, an employee at the stand, but did not pay for the purchases at the time because Mr. Hardy was unable to change the large bills being carried by Mr. Ingram. Dub Hardy is the father of the appellant in this case. Both he and his wife, Mary, worked at the produce stand.

During most of the time Mr. Ingram spent at the produce stand, he had exhibited indications of having consumed alcoholic beverages. On Saturday, being the fourth day of his visits at the stand, the victim met a number of people at the stand, including Dub and Mary Hardy, Billy Hardy, Carolyn Hardy, Edwin and Patsy McGill and Buster and Betty Minish. By the late afternoon, the victim was showing the effects of having consumed a considerable amount of alcohol. During Saturday evening, the victim, along with Buster Minish, left the produce stand to play poker at Billy Hardy's trailer. Buster Minish drove the victim's truck and his wife, Betty Minish, followed in another vehicle. Billy Hardy's trailer is situated only a few yards from the home of Dub Hardy. Billy Hardy and Kenneth Har-

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dy, the appellant here, are sons of Dub and Mary Hardy. Betty Minish is the wife of Buster Minish and a cousin of Mary Hardy. When Dub and Mary Hardy arrived at their home, Lewis Ingram's truck was located in the yard next to Billy Hardy's trailer. Mary Hardy became concerned that trouble was about to develop and urged Dub Hardy to get the victim out of the trailer. The victim, Buster Minish and the appellant, who had arrived upon the scene, had been arguing. Dub Hardy went to his son's trailer and found the victim on a couch in a very drunken state. He took the victim by the arm and led him to the door where he missed one of the steps and fell into the yard. The appellant then attacked the victim with a wrench wrapped in a rag and severely beat him about the head. Dub Hardy made an attempt to stop the fracas but was restrained by Buster Minish. At this point, the appellant got a shotgun and he, together with Billy Hardy and Buster Minish took the victim into the woods where appellant attempted to force the victim to tell where his money was. This attempt was not successful. Having failed in this effort, appellant and his companions brought the victim back to the yard and put him in the back of his own truck where he was joined by appellant. Billy Hardy drove the victim's truck and Buster Minish followed in another vehicle for a distance of some ten miles to a secluded area. At some point, gasoline was poured on the victim and there is evidence that the victim begged, "Please don't pour that gasoline on me."

Appellant shot and killed the victim and then his body was burned, along with the truck.

The shotgun was thrown into a lake from which it was later recovered and ballistic tests determined the shotgun to have been the murder weapon. Upon returning to the Billy Hardy home, Billy and Kenneth Hardy, as well as Buster Minish, were seen to have blood on their clothing and a considerable amount of blood was on the ground in the yard near the Billy Hardy home.

On the following day, Billy Hardy and Minish, together with Minish's wife planned the story to be told by each of the parties in order to avoid implication in the murder. During the early morning hours of Sunday just following the murder, Buster Minish told his wife that the pickup truck in which the victim and Kenneth Hardy were riding went across a little bridge and one shot went off and as they went up the road farther, there was another shot. At this point, Billy Hardy jumped out of the truck and dragged Kenneth Hardy out of the back and said "You ain't got no damn sense. You didn't have to do that." Buster Minish also at this time told his wife that Kenneth Hardy fired the shot which killed the victim.

A few days later, Buster Minish committed suicide.

Enumerations of Error

[1] 1. In his first enumeration of error, the appellant complains of a failure on the part of the trial court to exercise its discretion as required by law. The investigating officer was allowed to remain in the courtroom after the rule of sequestration had been invoked but was not required to be the first witness to testify. Appellant does not argue that the trial court abused his discretion in allowing this to occur. See *McNeal v. State*, 228 Ga. 633, 187 S.E.2d 271 (1972). Instead, it is argued that the trial court did not use its discretion at all but rather decided as a matter of policy that the officer could be called to testify at such time as the prosecutor pleased. *Stuart v. State*, 123 Ga.App. 311, 180 S.E.2d 581 (1971). In *Stuart*, it was held that the trial court should exercise its discretion both as to permitting exceptions to the sequestration of witnesses and as to the sequence of calling unsequestered witnesses. The exercise of the trial court's discretion should be based upon a showing that the state has some need not to call the unsequestered witness as the first to testify.

In the instant case, the state requested that GBI agent Pat Patterson be allowed to remain in the courtroom for the purpose of

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assisting the district attorney in the trial of the case. The state went further and stated, "his testimony will all be from investigation and nothing in the chronological order of the evidence we present." Appellant's attorney then objected to the witness being allowed to stay in the courtroom unless he be required to testify first. The court overruled the objection and in response to further argument of defense counsel on the point, the trial judge stated ". . . because I'm not going to dictate to the state in which manner the state introduces its evidence." The orderly presentation of evidence being a proper reason for an exception to the rule of sequestration, and the trial judge having based his ruling upon this exception, we find no error. *McNeal v. State*, supra.

2. The state called Mary Hardy who testified as to statements made to her by Billy Hardy which incriminated the appellant. She testified that upon his return from the murder scene, Billy Hardy told her that the appellant had "cut the victim all to pieces." Furthermore, the state offered the testimony of Betty Minish consisting of statements made to her by her now deceased husband the day after the killing. In these statements, Minish named appellant as the person who shot the victim. Attorney for appellant objected to the testimony of both witnesses on the grounds that the statements were hearsay. Appellant argues in his second and third enumerations of error that the trial court committed reversible error in overruling his objections and admitting the statements.

[2, 3] "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." Code Ann. § 38-306. The conspiracy is deemed in progress until its ultimate purpose is accomplished. It may include acts performed and declarations made after the commission of the crime. Conspiratorial efforts to conceal the fact of the crime and the identity of the perpetrators are a continuation of the conspiracy so that the parties to such a conspiracy would be considered so much of a unit that the declarations of either are admissible against the other. *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966); *Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726 (1965).

[4] There was evidence sufficient to establish a prima facie case of conspiracy to rob and kill the victim and thereafter conceal the murder. The statements of Billy Hardy and Buster Minish were made during the pendency of the conspiracy in that the concealment phase of the conspiracy was plainly pending.

[5, 6] Appellant argues however that even though the conspiracy had not ended, the statements lack the "indicia of reliability that would afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement" which is required for admissibility. *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979). We do not agree. The indicia of reliability required for admissibility are that the statements be non-narrative; that the declarant is shown by the evidence to know whereof he speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness. *Mooney v. State*, supra. It is not required that all of the indicia be present for the statement to be admissible. *Mancusi v. Stubbs*, supra; *Mooney v. State*, supra. The final three indicia are present in the instant case.

It is undisputed that both the declarants were present at the scene of the murder and knew of the facts. It cannot be said that either witness, the mother of appellant or the wife of a co-conspirator was apt to be proceeding on faulty recollection. While Mary Hardy was a reluctant witness, she had given a statement five days after the crime which confirmed her testimony. The testimony of Betty Minish was positive and direct. The declarants had no apparent reason to lie to the witnesses. Both state-

ments were inculpatory in that they placed the declarants at the scene of the actual murder. Furthermore, Billy Hardy's statement was spontaneous and given immediately after the crime. Buster Minish's statement was made before coaching his wife as to an alibi story to present to the authorities in case they were questioned.

The admission of the statements made by Billy Hardy and Buster Minish was authorized by Code Ann. § 38-306. Appellant's enumerations of error 2 and 3 are without merit.

[7, 8] 3. Appellant in his fourth enumeration of error contends the trial court erred in failing to charge the jury on the law of voluntary manslaughter. Appellant relies on the testimony of Dub Hardy that he heard the victim, the appellant and Buster Minish arguing. The record is not clear as to who was arguing with whom; however, it is clear that nothing more than words were passed and no threats were heard. It should also be noted that the arguments occurred prior to Dub Hardy taking the victim out of the trailer. According to Dub Hardy, the victim was in a drunken state and fell to the ground as he left the trailer. See *Hill v. State*, 236 Ga. 703, 224 S.E.2d 907 (1976). In order to warrant a charge of voluntary manslaughter, the evidence must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. *Swett v. State*, 242 Ga. 228, 248 S.E.2d 629 (1978); *Smith v. State*, 49 Ga. 482 (1873). We conclude from a study of the record that the evidence did not warrant a charge on voluntary manslaughter. Code Ann. § 26-1102; *Lowe v. State*, 240 Ga. 767, 242 S.E.2d 582 (1978). Furthermore, there was no written request to charge voluntary manslaughter. *Driggers v. State*, 244 Ga. 160, 259 S.E.2d 133 (1979); *Morgan v. State*, 240 Ga. 845, 242 S.E.2d 611 (1978); *State v. Stonaker*, 236 Ga. 1, 222 S.E.2d 354 (1976).

[9] 4. In his fifth enumeration of error, appellant contends there was a denial of due process of law as a result of the prosecutor reading from *Eberhart v. State*, 47 Ga. 598, 609 (1873). Prior to his opening argument, the prosecutor quoted to the court Code Ann. § 26-1101 and read dicta from *Eberhart*. Our review of that portion of the record reveals that in reading these passages, the prosecutor did not identify the judge who wrote them, the court which decided the case nor did he make any comments as to the outcome of the case. *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). This court has previously stated its disapproval of the reading of certain passages from *Eberhart* and this same disapproval is reiterated here. However, we have held it not to be error under the circumstances of this case. *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1978).

Sentence Review

The remaining enumerations of error address themselves to the sentence and are best covered by the sentence review mandated by Code Ann. § 27-2537(c)(1-3).

[10] 5. Appellant assigns error by reason of the fact that the prosecuting attorney was allowed to read to the court dicta from the case of *Hawkins v. State*, 25 Ga. 207 (1858) prior to his argument to the jury on sentencing. It is contended that this resulted in the imposition of the death penalty under the influence of passion, prejudice and other arbitrary factors. *Hawkins v. State* contains dicta similar to *Eberhart v. State*, supra. While this court has condemned such practice, *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977), we have held it not to be error under the circumstances here. *Drake v. State*, supra; *Ruffin v. State*, supra; *Godfrey v. State*, supra. Furthermore, we find the evidence against the defendant to be so overwhelming that the reading to the court in the presence of the jury of the dicta referred to could not have injected an improper element of passion, prejudice or other arbitrary factor. *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979).

ments were inculpatory in that they placed the declarants at the scene of the actual murder. Furthermore, Billy Hardy's statement was spontaneous and given immediately after the crime. Buster Minish's statement was made before coaching his wife as to an alibi story to present to the authorities in case they were questioned.

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[9] 4. In his fifth enumeration of error, appellant contends there was a denial of due process of law as a result of the prosecutor reading from *Eberhart v. State*, 47 Ga. 598, 609 (1873). Prior to his opening argument, the prosecutor quoted to the court Code Ann. § 26-1101 and read dicta from *Eberhart*. Our review of that portion of the record reveals that in reading these passages, the prosecutor did not identify the judge who wrote them, the court which decided the case nor did he make any comments as to the outcome of the case. *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979); *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977). This court has previously stated its disapproval of the reading of certain passages from *Eberhart* and this same disapproval is reiterated here. However, we have held it not to be error under the circumstances of this case. *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1978).

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Appellant's seventh enumeration of error is without merit.

After reviewing the entire record and transcript, we conclude that the sentence of death imposed on Kenneth Hardy was not imposed under the influence of passion, prejudice or any other arbitrary factor.

6. The trial court charged the jury in the sentencing phase that it could consider two aggravating circumstances. One, that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7), and, two, that the offense of murder was committed while the offender was engaged in the commission of a robbery.

[11, 12] In his sixth enumeration of error, appellant contends it was error to charge as an aggravating circumstance that the offense was committed while the offender was engaged in a robbery. We do not agree. The statute allows the trial court to charge statutory and non-statutory aggravating circumstances. Code Ann. § 27-2534.1(b). While the jury would not be authorized to impose the death penalty based on a finding as to the non-statutory aggravating circumstance, they were authorized to consider it in arriving at their verdict. The jury returned its verdict finding, beyond a reasonable doubt, both the statutory aggravating circumstance and the non-statutory aggravating circumstance. A finding of only one statutory aggravating circumstance is all that is required to authorize the imposition of the death penalty. Code Ann. § 27-2534.1(c). The murder in this case was conducted in methodical execution-type fashion. The perpetrators severely beat and partially disrobed the victim seeking to find where the victim kept his money. The victim was "cut all to pieces" and gasoline was poured over him before he was shot. When appellant returned from the killing, he had blood on his clothing and there was blood in the yard where the victim was beaten. This clearly evidenced a depravity of mind on the part of appellant and involved torture to the victim. In both respects, it was outrageously and wantonly vile. The evidence supports the jury's finding of this statutory aggravating circumstance as well as the jury's finding of the non-statutory aggravating circumstance.

Furthermore, the evidence supports a finding of guilt beyond a reasonable doubt by a rational trier of fact. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and the verdict and sentence are factually substantiated. We have reviewed the charge of the trial court to the jury in the sentencing phase of the trial and find it is not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1978) and *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1978).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence has been imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty.

Kenneth Hardy's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX

Lingo v. State, 226 Ga. 496, 175 S.E.2d 657 (1970); *Johnson v. State*, 226 Ga. 511, 175 S.E.2d 840 (1970); *Hunter v. State*, 231 Ga. 494, 202 S.E.2d 441 (1973); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Tamplin v. State*, 235 Ga. 20, 218 S.E.2d 779 (1975); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248 (1976); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978);

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APPENDIX—Continued

Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979); *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979).

APPENDIX C

December 10, 1980

HON. JOLINE WILLIAMS
Clerk
Georgia Supreme Court
Room 506, Judicial Building
Capitol Square
Atlanta, Georgia 30334

Re: Kenneth Hardy v. State of Georgia
No. 35588

Dear Ms. Williams:

I would appreciate your filing the enclosed appellant's motion for full briefing and for oral argument on remand to this court in the above case.

Thank you very much.

Sincerely yours,

Original Signed By
M.B. FILSON

M. B. FILSON,
Attorney

:ner

Enc.

IN THE SUPREME COURT OF GEORGIA

KENNETH HARDY, Appellant,	:	
-against-	:	No. 35588
STATE OF GEORGIA, Appellee.	:	

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

MARGUERITE B. FILSON
Western Electric Company, Incorporated
222 Broadway
New York, New York 10038

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF GEORGIA

KENNETH HARDY,	:	
Appellant,	:	
-against-	:	No. 35588
STATE OF GEORGIA,	:	
Appellee.	:	

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

Appellant Kenneth Hardy, by his undersigned counsel, moves this Court for full briefing and for oral argument of the issues raised by the vacation of judgment ordered by the Supreme Court of the United States and the remand of his case "for reconsideration in light of Godfrey v. Georgia," ____ U.S. ____, 49 U.S.L.W. 3371 (U.S., November 18, 1980) (No. 80-5010).

Prior Proceedings

Appellant was convicted of the murder of Lewis Ingram in the Superior Court of Banks County and sentenced to death on January 13, 1978. The trial jury found two aggravating circumstances in support of the death sentence: (1) that the murder had been "outrageously or wantonly vile, horrible or inhuman" Ga. Code Ann. Section 27 2534.1(b)(7), and (2) the non-statutory aggravating circumstance that the offense was committed during a robbery.

This Court affirmed appellant's conviction and sentence in Hardy v. State, 245 Ga. 264 S.E.2d 209 (1980). No petition for rehearing was filed.

In his petition for writ of certiorari filed in the United States Supreme Court on July 2, 1980, appellant presented three questions:

> "1. Whether the failure of the trial court and the Georgia Supreme Court to place a limiting construction on the language of the Georgia statute permitting the jury to impose the death sentence in certain vaguely defined circumstances violated petitioner's Eighth and Fourteenth Amendment rights as set forth in Godfrey v. Georgia.
>
> 2. Whether the trial court's error in instructing the jury that it could impose the penalty of death upon the finding of a non-statutory aggravating circumstance tainted the sentencing deliberation in violation of petitioner's Eighth and Fourteenth Amendment rights.
>
> 3. Whether the improper, inflammatory and prejudicial closing arguments of the prosecutor which included quotations read from Georgia Supreme Court cases denied petitioner the fundamental fairness required by the due process clause and the reliability in sentencing required by the Eighth Amendment."

On November 17, 1980, the United States Supreme Court entered the following order:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. ___ (1980)." ___ U.S. ___, 49 U.S.L.W. 3371 (U.S., November 18, 1980).

Issues Presented on Remand

This case presents a number of important issues on remand, including: (1) The nature and extent of the holding in Godfrey v. Georgia, supra; (2) The application of the (b)(7) aggravating circumstance to the facts of appellant's case; (3) The effect of the possible misapplication of the (b)(7) circumstances on those cases in which two or more aggravating circumstances have been found by the trial jury; (4) The effect of the trial court's erroneous instruction to the jury that it could impose the death penalty upon the finding of a non-statutory aggravating circumstance.

WHEREFORE, appellant urges this Court to permit him to brief fully and argue these and any other issues presented on remand, on a schedule to be established by the Court, in order to assist the Court in resolution of these complex issues which directly affect his sentence.

Respectfully submitted,

Marguerite B. Filson

MARGUERITE B. FILSON
Western Electric Company, Incorporated
222 Broadway
New York, New York 10038

December 10, 1980 ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the annexed Motion on Respondent by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows:

Daryl A. Robinson, Esq.
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square S.W.
Atlanta, Georgia 30334

Done this 10th day of December, 1980.

Marguerite B. Filson

MARGUERITE B. FILSON
Western Electric Company,
Incorporated
222 Broadway
New York, New York 10038

ATTORNEY FOR APPELLANT

Opposition

ORIGINAL

NO. 81- 5478

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH HARDY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DARYL A. ROBINSON
Assistant Attorney General
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QUESTION PRESENTED

1.

Was the statutory aggravating circumstance which existed in Petitioner's case properly instructed by the trial court, found by the jury, and reviewed on appeal by the Supreme Court of Georgia?

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NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KENNETH HARDY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Kenneth Hardy was convicted in the Superior Court of Banks County, Georgia, and sentenced to die for the murder of Lewis J. Ingram. His conviction and death sentence were affirmed by the Supreme Court of Georgia on direct appeal. Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980). From this adverse decision, Petitioner filed his petition for a writ of certiorari in this Court. On November 17, 1980, the Court remanded this case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Following the remand, that court on March 3, 1981, reaffirmed the death sentence. Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981).

Almost seven months after the decision of the Supreme Court of Georgia on remand, this untimely petition for a writ of certiorari was filed with the Court.[1/]

The events which culminated in the murder of Lewis J. Ingram began when Ingram left his residence in Thomasville, North Carolina, and traveled to his boyhood home in Commerce, Georgia, in order to visit relatives and friends. While in Commerce, Ingram spent much of his time at Willie Brown's produce stand and as a result became acquainted with the employees of that business. During his visits to the produce stand, Ingram made several purchases but was unable

---

[1/] Petitioner correctly notes that an untimely petition such as this does not deprive the Court of jurisdiction; Petitioner further notes simply that because this is a capital case it is "crucial" that this Court consider the petition. Certainly such untimely petitions are not favored by the Court. Respondent takes issue with Petitioner's plea that simply because his is a capital case it warrants special consideration. That Petitioner is to be executed should confer upon him no more or no less consideration that any other person petitioning this Court.

immediately to pay for the items because Dub Hardy, the father of Petitioner and an employee at the stand, was unable to change the large bills presented by Ingram as payment. Ingram evidently had more than $1,000.00 in his possession upon leaving North Carolina and this money was mostly in $100 bills.

On the fourth day of his visits at the stand, Ingram met several people there, including Dub and Mary Hardy, Billy Hardy, and Buster and Betty Minish. After consuming a considerable amount of alcohol, Ingram left the stand with Buster Minish to play poker at Billy Hardy's trailer. While at the trailer, Ingram, Buster Minish and the Petitioner, who had arrived upon the scene, argued. Mary Hardy, who lived with her husband Dub in a home only a few yards away from Billy Hardy's trailer, became concerned about this behavior and asked her husband to get Ingram out of the trailer. Dub Hardy responded by walking to his son's trailer where he found Ingram on a couch in a condition of extreme intoxication. He took Ingram by the arm and attempted to lead him from the trailer but Ingram missed one of the steps at the door and fell into the yard. At this point, Kenneth Hardy attacked Ingram with a wrench, severely beating him about the head. Petitioner then took a shotgun and, along with Billy Hardy and Buster Minish, took Ingram into the woods and attempted to force him to tell where his money was. When unsuccessful, Petitioner and the others brought Ingram back and forced him into the back of his own truck with Petitioner. Billy Hardy then drove the truck to a secluded area as Buster Minish followed in another vehicle. At some point, gasoline was poured on Ingram and Petitioner then shot Ingram with a shotgun and burned his body along with his truck.

If necessary to address adequately any issue raised in the petition, additional facts will be recounted in the remaining portion of this brief.

PART TWO

REASON FOR NOT GRANTING THE WRIT

I. THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH EXISTED IN PETITIONER'S CASE WAS PROPERLY INSTRUCTED BY THE TRIAL COURT, FOUND BY THE JURY, AND REVIEWED ON APPEAL BY THE SUPREME COURT OF GEORGIA.

Although Petitioner enumerates three reasons for which the writ of certiorari should be granted, his allegations in reality are (1) that the trial court's instructions on aggravating circumstances were erroneous and (2) that the review conducted by the Supreme Court of Georgia both on direct appeal and on this Court's remand was improper. In this later ground, Petitioner alleges, apparently, some sort of right to submit briefs and oral argument to the Supreme Court of Georgia on remand. Neither ground presents any sufficient reason for granting the petition for a writ of certiorari.

First, the evidence supported the jury's finding of the statutory aggravating circumstance defined in Ga. Code Ann. § 27-2534.1 (b)(7); therefore, the resulting imposition of the death penalty was not impaired merely because the jury also considered the non-statutory aggravating circumstance that the offense of murder was committed while the Petitioner was engaged in the commission of a robbery.

The trial court charged the jury in the sentencing phase that it could consider two aggravating circumstances: (1) that the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. § 27-2534.1(b)(7),

and (2) the offense of murder was committed while Petitioner was engaged in the commission of a robbery.

The constitutionality of Ga. Code Ann. § 27-2534.1(b)(7) was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). Nevertheless, the Georgia Supreme Court has been committed to a strict construction of section (b)(7) in order to insure that it does not become a "catch-all" for cases which do not fall within the definitions of the other statutory aggravating circumstances enumerated in Ga. Code Ann. § 27-2534.1(b) and has stated that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1 (1976). The Georgia Supreme Court has clarified its position concerning cases involving section (b)(7) in light of Godfrey v. Georgia, 446 U.S. 420 (1980), a case in which section (b)(7) was held to have been unconstitutionally applied under the specific facts of that case. In Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the court emphasized that:

> [t]his statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) the offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining '[w]hether. . . the evidence supports the jury's or judge's finding of [this] statutory aggravating circumstance. . .' (Code Ann. § 27-2537(c)(2)), the evidence must be sufficient to satisfy the first

> major component of the statutory aggravating circumstance and at least one sub-part of the second component. . . .

Id. at 860-61. In the present case "[t]he perpetrator severely beat and partially disrobed the victim seeking to find where the victim kept his money. The victim was 'cut all to pieces' and gasoline was poured over him before he was shot." Hardy v. State, 245 Ga. 272, 280, 264 S.E.2d 209 (1980). There is evidence that prior to being shot and burned along with his truck, "the victim begged, 'please don't pour that gasoline on me.'" Id. at 274. Such actions go to the very core of Ga. Code Ann. § 27-2534.1 (b)(7) and can certainly be distinguished from the conduct involved in cases in which the death penalty is not imposed. See Godfrey v. Georgia, 446 U.S. 420 (1980). This conduct "clearly evidenced a depravity of mind on the part of [Petitioner] and involved torture to the victim. In both respects, it was outrageously and wantonly vile." Hardy v. State, 245 Ga. 272, 280, 264 S.E.2d 209 (1980). Thus, the evidence factually substantiates and supports the finding of section (b)(7) and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

Since robbery, as opposed to armed robbery, is not a capital felony for purposes of imposing the death penalty, the second aggravating circumstance charged in this case does not fall within the definition of any one of the statutory aggravating circumstances enumerated in Ga. Code Ann. § 27-2534.1(b). It must be emphasized, however, that regardless of a finding of nonstatutory aggravating circumstances, the finding of one statutory aggravating circumstance is sufficient to authorize the death penalty. Ga. Code Ann. § 27-2534.1 (c). The Georgia Supreme Court has held repeatedly that "the

failure of one circumstance does not taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979); see also Burger v. State, 245 Ga. 458, 461-62, 265 S.E.2d 796 (1980); Patrick v. State, 245 Ga. 417, 425, 265 S.E.2d 553 (1980); Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976). [2/] Specifically, the present case closely parallels those cases in which the Supreme Court of Georgia has upheld the death penalty on the basis of the finding of another aggravating circumstance when "the trial court erred during the sentencing phase in charging on kidnapping, as a statutory aggravating circumstance, when simple kidnapping is not a capital felony." Patrick v. State, 245 Ga. at 424; see also Burger v. State, supra. Thus, given the finding of section (b)(7) in this case, the charge on robbery as opposed to armed robbery as an aggravating circumstance does not invalidate the death penalty. The evidence of the robbery was properly before the jury and could be considered by them.

The statutory aggravating circumstance found by the jury was amply supported by the evidence and authorized the jury to impose a sentence of death.

Petitioner argues that the review by the Supreme Court of Georgia on remand does not cure what he claims was an insufficiently guided jury. The implication is review by the Supreme Court of Georgia is, in effect, a de novo sentencing and the appropriate course of action would be to order new jury sentencing. If that is Petitioner's assertion, it is without support. Upon initially

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[2/] As the Court is no doubt aware, this is the same Stephens in which a petition for a writ of certiorari was granted in Zant v. Stephens, Case No. 81-89.

reviewing Petitioner's death sentence, the Supreme Court of Georgia considered the death penalty as it is required to do under Georgia law. Ga. Code Ann. § 27-2537. As required, the review was conducted. In remanding, this Court did not order the original death sentence vacated. Rather, the Court vacated the judgment of the state appellate court dealing with sentence review. Therefore, on remand, the Supreme Court of Georgia was merely reconducting its appellate review of the death penalty. The state court did not reimpose the death sentence but merely reaffirmed the death sentence already imposed by the trial jury.

Petitioner contends he has somehow been harmed, without specifying the nature of the harm, because he was not allowed to submit additional briefs on remand. There is no requirement that the Supreme Court of Georgia allow such briefs filed or oral argument made. These are exclusively matters within the province of the Supreme Court of Georgia and the rules of that court. That court merely conducted a portion of its appellate review in more detail, reconsidering its own judgment.

More importantly, Petitioner contends this Court should grant certiorari to consider whether the Supreme Court of Georgia construed Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. As noted in the foregoing portion of this brief, contrary to Petitioner's assertions, since this Court decided Godfrey the Supreme Court of Georgia has gone to great lengths to make its appellate review an elaborate and detailed process by examining each case, including the facts surrounding the offense, thoroughly. As this Court is aware, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), the Court in detail defined and explained the seventh aggravating circumstance.

In considering Petitioner's death sentence on remand in light of Godfrey, the Supreme Court of Georgia found material differences between Godfrey and Hardy which distinguished Hardy's act from those cases in which the death penalty is not appropriate:

> In Godfrey v. Georgia, supra, the Supreme Court of the United States held that Code Ann § 27-2534.1(b)(7) was unconstitutionally applied as to a specific factual circumstance. See Hance v. State, 245 Ga. 856 (268 SE2d 399) (1980).
>
> The appellant's sentence to death in this case rests upon a finding by a rational trier of fact beyond a reasonable doubt of Code Ann. § 27-2534.1(b)(7). [footnote omitted]
>
> As mandated, we have reviewed the sentence in this case, and this court finds material difference between Godfrey and the case under review which distinguish this murder from the murder in Godfrey and from other "ordinary murders" for which the death penalty is not appropriate.
>
> The evidence in this case shows that unlike Godfrey, the victim was not killed instantaneously; he was not a member of the appellant's family, nor was he threatening the appellant in any manner. This was a coldblooded, planned execution type murder perpetrated for the purpose of robbing the

victim, who was known to have a large amount of cash. With that purpose in view, the perpetrator severely beat and partially disrobed the victim seeking to find where he kept his money. As was pointed out in the original opinion, the victim was "cut all to pieces" and gasoline was poured over him before he was shot. When the appellant returned from the killing, he had blood on his clothing, and there was blood in the yard where the victim had been beaten prior to being put in the back of a pickup truck and taken to the actual execution site. Thereafter, the victim's truck with his body in it was burned in order to hide the crime.

The evidence supports a finding beyond a reasonable doubt of serious physical abuse prior to death. Hance v. State, supra. As we held in our original opinion, the jury's finding of Code Ann. § 27-2534.1 (b) (7), torture occurs when the victim is subjected to serious physical abuse before death. Hance v. State, supra. A defendant who tortures a victim or subjects a victim to an aggravated battery before killing a victim can be found to have a depraved mind. See Baker v. State, 246 Ga. 259 (272 SE2d 61) (1980).

> Under the facts of this case, we find that the murder was of the type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim as set forth above.

Hardy v. State, 247 Ga. 235, 235-36, 275 S.E.2d 319 (1981). In short, it is evident that the statutory aggravating circumstance on which Petitioner's death sentence is based was properly instructed by the trial court, appropriately found by the jury based upon the evidence, and correctly reviewed on appeal and on remand by the Supreme Court of Georgia.

CONCLUSION

No sufficient reasons having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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